

New Nasdaq's Proposed Rules Will Broaden the Boardroom

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The long-needed push and support for diversity, inclusion, and equity in the corporate world is finally making serious impact on the financial sector, and may actually signal true progress. Corporate press releases noting commitments to diversity, inclusion, and equity are commonplace these days, and many of these initiatives aim to diversify boards and the c-suite. The Nasdaq Stock Market recently joined these efforts, but took things a step further by proposing new rules requiring board diversity for companies listed with Nasdaq. It should be noted that Nasdaq is not the first to push for diversity requirements, and similar requirements have been implemented in California and at least 11 other states. But Nasdaq's strong stance will undoubtedly lead to concrete changes in many of the world's largest corporations.

On December 11, 2020, Nasdaq submitted its "Proposal to Adopt Listing Rules related to Board Diversity" to the SEC for its approval. On February 26, 2021, Nasdaq filed amendments to the proposal based on over 200 comments it received. The rules are very encouraging for those eager to see better representation in the boardrooms of corporations.

One of the proposed rules would require each Nasdaq-listed company, subject to certain exceptions, to (1) have, or explain why it does not have, at least one director who self-identifies as a female, and (2) have, or explain why it does not have, at least one director who self-identifies as Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, two or more races or ethnicities, or as LGBTQ+.[1] A second rule would require all Nasdaq-listed companies to publicly disclose board-level diversity statistics by the later of one calendar year from the date the SEC approves the proposal, or the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for its annual meeting of shareholders during the calendar year when the proposal is approved.[2]

Nasdaq explained its new diversity initiative as follows:

- The goal of the proposal is to provide stakeholders with a better understanding of a company's current board composition and enhance investor confidence that our listed companies are considering diversity in the context of selecting directors, either by meeting the proposed board diversity objectives or by explaining their reasons for not doing so, which can include describing an alternative approach.[3]

In the recently filed amendment, Nasdaq states “Corporate culture, human capital management, and technology-driven changes to the business landscape have underscored the benefits of enhanced board diversity—diversity in the boardroom is good corporate governance.”[4] For those who have experienced the “boys’ club” atmosphere of some boardrooms, such changes give hope for equitable and inclusive treatment.

There may be further amendments to the proposal prior to its approval, and this article provides a brief summary of the proposed rules as of the date this article was written. The proposed rules are complex with many exceptions to consider, and different timelines for compliance based on a company’s listing tier. If adopted, Nasdaq-listed companies must meet the new board requirements in 2-5 years, based on their listing tier, or provide an explanation why the company will fail to do so within the same timeframe.[5] This is a short period given the required lead time necessary to recruit and vet directors for Nasdaq-listed companies. Therefore, Nasdaq-listed companies should currently be looking to recruit directors who are diverse, if they are not already doing so, or risk being left even further behind. For those companies having difficulty locating diverse candidates, Nasdaq created a partnership with Equilar, a provider of corporate leadership data solutions, to provide placement and recruiting assistance.[6] Equilar is certainly a helpful resource, but this seems like one area in which these firms should avoid outsourcing.

If the proposal is adopted, what happens to a Nasdaq-listed company that fails to comply? Nasdaq’s Listing Qualifications Department would first promptly notify the company that it has until the later of its next annual shareholders meeting, or 180 days from the event that caused the deficiency, to cure the deficiency.[7] A company can cure the deficiency either by meeting the applicable minimum diversity objectives or by providing the alternative public disclosure requirements.[8] If a company does not comply within the applicable period, it could be delisted from Nasdaq.

The public comment period is still open for Nasdaq’s proposed rules, and should you or your organization be so inclined, you can file comments with the SEC using this link: <https://www.sec.gov/rules/sro/nasdaq.htm#SR-NASDAQ-2020-081>. But the current state of the proposed rules are very encouraging, and likely to be approved by the SEC in similar form in the near future. If Nasdaq adopts these rules, they will have significant impact on diversity and inclusion in the higher echelons of businesses, as most Nasdaq-listed companies currently fall short of the diversity requirements. Though it would be a better solution if American companies would take these inclusive measures without the need for new regulations from the stock exchange, it is very welcome news that Nasdaq recognizes that diversity is good business, and broadening the boardroom also makes for better business decision making.

[1] SR-NASDAQ-2020-081 Amendment 1, Nasdaq Listing Rule 5605(f) (Diverse Board Representation) (proposed Feb. 26, 2021), https://listingcenter.nasdaq.com/assets/RuleBook/Nasdaq/filings/SR-NASDAQ-2020-081_Amendment_1.pdf

[2] SR-NASDAQ-2020-081 Amendment 1, Nasdaq Listing Rule 5606 (Board Diversity Disclosure) (proposed Feb. 26, 2021), https://listingcenter.nasdaq.com/assets/RuleBook/Nasdaq/filings/SR-NASDAQ-2020-081_Amendment_1.pdf.

[3] Nasdaq's Proposal To Adopt Listing Requirements For Board Diversity, What Nasdaq-Listed Companies Should Know, Nasdaq (accessed March 9, 2021), <https://listingcenter.nasdaq.com/assets/Board%20Diversity%20Disclosure%20Five%20Things.pdf>.

[4] SR-NASDAQ-2020-081 Amendment 1, at 6 (proposed Feb. 26, 2021), https://listingcenter.nasdaq.com/assets/RuleBook/Nasdaq/filings/SR-NASDAQ-2020-081_Amendment_1.pdf

[5] Nasdaq's Board Diversity Rule Proposal FAQs (accessed March 9, 2021), Nasdaq Listing Center https://listingcenter.nasdaq.com/Material_Search.aspx?mcd=LQ&cid=157&sub_cid=&years=2020&criteria=1&materials

[6] Id.

[7] Id.

[8] Id.

